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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER DAVID GESNER, Defendant and Appellant.	H044471 (Santa Clara County Super. Ct. No. C1366337)

Defendant Christopher David Gesner attacked his former girlfriend in her home, sexually assaulted her, and threatened to kill her and her family. Upon leaving her home, he stole her car. The district attorney charged Gesner with a number of offenses arising out of these events. Following a jury trial, he was sentenced to a term of imprisonment of 45 years to life, consecutive to a determinate term of four years eight months.

On appeal, Gesner argues that the trial court erred in imposing consecutive 15-year-to-life sentences on each of the three sexual offenses and in imposing a consecutive four-year term on his conviction for dissuading a witness. Gesner also contends that this court should review sealed records pertaining to an earlier investigation involving the DNA analyst who testified at Gesner's trial.

For the reasons stated below, we conclude that the trial court did not commit sentencing error. Pursuant to Gesner's request, we have reviewed the sealed records and

have determined that the the trial court acted properly when it concluded that the records did not contain exculpatory information. We affirm the judgment.

I. FACTS AND PROCEDURAL BACKGROUND

Gesner was charged by amended information with forcible rape (Pen. Code, § 261, subd. (a)(2), count 1),[1] forcible oral copulation (§ 288a, subd. (c)(2), count 2), forcible sexual penetration (§ 289, subd. (a)(1)(A), count 3), dissuading a witness (§ 136.1, subd. (c)(1), count 4), and unauthorized use of a vehicle (Veh. Code, § 10851, subd. (a), count 5). The amended information also alleged that Gesner committed the sexual offenses during a burglary (§ 667.61, subds. (a), (d)) and while personally using a deadly weapon (§ 667.61, subds. (b), (e)). Finally, the amended information alleged that Gesner had suffered a prior conviction in Oregon that qualified as a strike prior (§§ 667, subds. (b)-(i), 1170.12), and he had served a prior prison term (§ 667.5, subd. (b)).

The evidence presented at Gesner's jury trial elicited the following facts. Sometime in 2010, Gesner began dating Brenda Doe, who was living with her mother in Santa Clara. Brenda and Gesner dated for about two years. A few months after they started dating, Gesner began living in the back yard of Brenda's mother's house. Brenda's mother refused to allow Gesner to live in the house but agreed that he could stay in a tent in their back yard. Although Brenda and her mother agreed that Gesner would not sleep in Brenda's bedroom, Brenda let Gesner into her bedroom through her window every night. Gesner lived in the back yard for at least one year.

Gesner was physically violent toward Brenda. Three or four months after one incident in which he beat her with a plastic pipe that was part of a boat oar, Brenda ended their relationship. Gesner moved out of the back yard around that time. Following their breakup, which occurred in mid-2012, Gesner would occasionally come to the house and

[1] Unspecified statutory references are to the Penal Code.

would call Brenda on the phone multiple times. By that time, Brenda's mother had asked Santa Clara police to tell Gesner to stay off her property.

Around 11:30 p.m. on September 18, 2013, Brenda's mother was in her garage when the porch light came on, and she heard someone knocking on the door. She saw Gesner through the window, and he said he wanted to talk to Brenda. Brenda's mother told Gesner that Brenda did not want to see him, and he should leave her property. Gesner again asked to see Brenda, and her mother told him firmly, " 'Get off my property.' " Brenda's mother looked down for a moment, and, when she looked up again, Gesner was gone. She went inside the house and told Brenda, who was taking a shower, that Gesner had been at the door. Brenda had not seen Gesner for about a year.

When Brenda finished her shower, she went to her bedroom. Brenda noticed that her bedroom window, which opened to the back yard, was wide open. Brenda assumed Gesner had opened it, looked for Brenda, and then had left. Brenda normally kept her window open only two or three inches to prevent her cat from getting out. On that evening, when Brenda returned to her bedroom after the shower, Brenda's cat ran out of the open window. Brenda went outside to get her cat and then returned to her bedroom.

Brenda noticed that her closet door was open. Thinking that her cat had opened the door, Brenda closed it, turned off her bedroom light, and went to bed. As Brenda started to fall asleep, she heard a noise but assumed it was the cat.

Brenda suddenly woke up and felt someone's weight on top of her. Brenda quickly realized the person on top of her was Gesner. Gesner had one hand on her shoulder and another near her throat. He said that "he was going to take what was owed to him." Gesner told Brenda not to scream, and if she did, he would slit her throat, her mother's throat, and kill her cat. Brenda tried to push Gesner off but could not.

Gesner dropped his pants, held his forearm against Brenda's throat, and got between her legs. Brenda testified that Gesner kept his forearm against her throat most of the time, although the amount of pressure he applied varied. She stated, "Part of the time

it felt like he was trying to knock me out[,] [and] [p]art of the time he [*sic*] felt like he was just trying to subdue me." Gesner put his penis in Brenda's vagina but soon lost his erection. Gesner then inserted his fingers in her vagina, while Brenda asked him to stop. Gesner began to orally copulate her before again trying to put his penis in her vagina. Gesner could not maintain an erection, so he began to masturbate himself.

Gesner turned Brenda over onto her stomach and inserted his penis in her vagina. As he penetrated her from behind, Gesner pulled out a knife and showed it to her, placing it near her throat. The blade of the knife was open and was about four inches long. Gesner also told Brenda he had a " '.38' " or " '.45,' " which she understood to mean that he had a gun. Brenda had never seen Gesner with a gun, and he did not show one to her that night.

Gesner turned Brenda over onto her back, pushing her legs up to her shoulders. Gesner orally copulated Brenda a second time, while pushing his fingers into her vagina. He tried to put his penis in her again but could not maintain his erection to penetrate her fully. Gesner grabbed a water bottle from Brenda's nightstand and drank from it. The police later collected this water bottle as evidence.

Brenda tried to scream, but Gesner pushed down on her throat with his forearm. Gesner told her not to tell the police or "[h]e'd come back and kill [her] and [her] family." Gesner told Brenda that he would be "listening on his police scanner." Brenda believed Gesner and was scared. Gesner then released her, pulled up his pants, and asked her to forgive him. Gesner also told Brenda to "keep an eye on the obituaries because he took a whole [b]unch of pills." Gesner hopped out of the window. Brenda did not smell alcohol on Gesner's breath, and he did not appear to be under the influence of alcohol. She estimated the sexual assault lasted about an hour in total.

After Gesner left, Brenda curled up in "a ball on [her] bed[]" and cried for five to ten minutes. She went into her mother's room, woke her up and told her what happened. Her mother said they should call the police, but Brenda told her Gesner had threatened to

kill them both if she called the police. Her mother persisted and, after about half an hour, Brenda agreed to talk to the police. Brenda's mother called 911, and police were dispatched to the residence at 2:19 a.m.

Brenda asked her mother to retrieve Brenda's car key from her bedroom as they were leaving the house that night after speaking with the police. Brenda had only one key to her car, and her mother could not find the key. When Brenda went outside to get into the police car, she noticed that her car was missing.[2]

At the hospital, a sexual assault response team (SART) nurse examined Brenda and swabbed the areas of her body where she indicated Gesner had put his mouth, including her vagina, ear, arm, and leg. The SART nurse testified that she observed visible trauma to Brenda's vagina that was consistent with non-consensual intercourse. She also observed bruising on Brenda's neck that was consistent with strangulation. The DNA analyst testified that the DNA recovered from the swabs of Brenda's vagina, arm, and leg, as well as the water bottle in her bedroom, was consistent with Gesner's DNA.

Gesner testified about his activities on September 18, 2013. He said he purchased some methamphetamine around 4:30 p.m., some of which he snorted and some of which he smoked, before going to a bar by himself around 5:30 p.m. Gesner ordered a beer and a shot of whiskey, followed by some mixed drinks, beers, and shots. In total, Gesner recalled having seven to ten drinks that evening. At some point, he went into the bathroom at the bar and snorted more methamphetamine.

Gesner does not know how long he was at the bar. The next thing he remembers from that night is waking up a little after 3:00 a.m. behind the wheel of a car he did not recognize. He opened the glove box and learned the car belonged to Brenda. He drove

[2] When Gesner was arrested on September 21, 2013, police found Brenda's car key in his pocket. Gesner told police where he left Brenda's car, and the police recovered it from that location.

the car back to her home. When he got close to her house, Gesner saw five to ten police cars outside, and he drove away. Gesner thought the police were there because Brenda had reported her car stolen. He could not recall how he ended up in her vehicle that night. Gesner drove Brenda's car for a couple of days before leaving it on a public street.

Gesner had no recollection of going to Brenda's house, climbing through her window, or sexually assaulting her. He testified that he had previously blacked out from drinking on several occasions.

A forensic psychiatrist testified for the defense as an expert on the effects of methamphetamine and alcohol on the body and on alcohol-induced blackouts. According to the defense expert, ingesting a large quantity of alcohol interferes with the function of the hippocampus, which is the portion of the brain involved in the formation of memories. Once the hippocampus is effectively shut down, a person can walk and speak and perform a variety of actions but be unable to later recall anything while the hippocampus is "off-line."

In rebuttal, the prosecution called Larry Ranger, a transient who was living near Gesner in Santa Clara's Central Park in mid- to late-2013. A couple of weeks after Ranger met Gesner, they were talking in the park and Gesner said things that Ranger thought were odd. Gesner was talking about having sex with a woman and asked Ranger " 'if a woman . . . says "no," [does] that mean "no"?' " Ranger asked Gesner if he had raped someone, but Gesner did not respond. At some point, Gesner said " 'Yeah, I made her do a bunch of things.' "

During the conversation, Gesner said that he had stolen a car from his ex-girlfriend. He also mentioned "having someone in the closet," using a knife, and having "some type of altercation . . . with her and him and her mother." A few days later, Ranger saw Gesner in the park and Gesner appeared upset that Ranger had told other people in the park about their earlier conversation. Gesner told Ranger " 'I never said that.' "

The jury found Gesner guilty of all five counts and found true the special allegation that Gesner used a deadly weapon in committing the sexual offenses (counts 1, 2, & 3). The jury found not true the special allegation that Gesner committed a burglary while perpetrating counts 2 and 3 and deadlocked on the allegation that he committed a burglary in the course of perpetrating count 1.[3]

The trial court bifurcated the trial on the allegations related to Gesner's prior criminal conduct. The parties waived a jury trial on those allegations. After conducting a court trial, the trial court found true the allegation that Gesner had served a prior prison term (§ 667.5, subd. (b)) but concluded that Gesner's prior conviction in Oregon did not qualify as a strike under California law.

At sentencing, the trial court imposed consecutive 15-year-to-life sentences on counts 1, 2, and 3. (§§ 667, subd. (d), 667.61, subds. (b), (c), (e) & (i).) The trial court found that "the evidence in this case showed that . . . each of the sexual crimes was a separate act with sufficient time for the defendant to reflect. I think the evidence actually showed that he certainly did reflect and, in fact, intended to continue with the acts as separate incidents. Although occurring in one evening, I believe consecutive sentencing is certainly appropriate."

On counts 4 and 5, the trial court imposed a consecutive, determinate term of four years eight months, consisting of the aggravated term of four years on count 4 (§§ 136.1, subd. (c)(1), 1170.15) and eight months (one-third of the middle term of two years) on count 5 (Veh. Code, § 10851, subd. (a), § 1170.1, subd. (a)). The trial court awarded Gesner custody credits of 1,224 days, plus 183 days pursuant to section 2933.1, for total credits of 1,407 days.[4] Gesner timely appealed.

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[3] The trial court declared a mistrial on that allegation.

[4] Neither the abstract of judgment nor the trial court's statements at the sentencing hearing indicate that the trial court imposed a sentence on the allegation regarding the prison prior.

II. DISCUSSION

A. *Review of Sealed Records for Exculpatory Information*

Before trial, the prosecution subpoenaed records from the San Francisco Police Department (SFPD) relating to an internal affairs investigation in 2010 involving the DNA analyst scheduled to testify at Gesner's trial.[5] In response, the SFPD filed a motion claiming the information was privileged, raising both the official information and employee privacy privileges, and sought an in camera review by the trial court of the records. After reviewing the records in camera, the trial court elected not to release them based upon the privacy privileges asserted on behalf of the DNA analyst. The trial court further concluded that none of the records fell within the prosecutor's disclosure obligations under *Brady v. Maryland* (1963) 373 U.S. 83. The trial court did not disclose any of the records to either side and retained them under seal. The trial court granted the prosecution's in limine motion precluding the defense from impeaching the DNA analyst with the incidents. Gesner asks us to independently examine the sealed records to determine whether the trial court erred in not disclosing them.

The Attorney General opposes the request, arguing that Gesner has no standing to ask for such a review since he did not join the prosecutor's motion to release the documents. We disagree.

"As a general principle, standing to invoke the judicial process requires an actual justiciable controversy as to which the complainant has a real interest in the ultimate adjudication because he or she has either suffered or is about to suffer an injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented to the adjudicator. [Citations.] To have standing, a party must be beneficially interested in the controversy; that is, he or she must have 'some special interest to be served or some particular right to be preserved or protected over and above

[5] The DNA analyst was previously employed by the SFPD crime laboratory.

the interest held in common with the public at large.' [Citation.] A complaining party's demonstration that the subject of a particular challenge has the effect of infringing some constitutional or statutory right may qualify as a legitimate claim of beneficial interest sufficient to confer standing on that party." (*Holmes v. Cal. Nat. Guard* (2001) 90 Cal.App.4th 297, 314–315 (*Holmes*).)

Regardless of whether he joined in the prosecution's motion for the release of documents, Gesner's constitutional rights to due process under the Fourteenth Amendment to the United States Constitution and *Brady* represent "a legitimate claim of beneficial interest sufficient to confer standing" to seek our review of the documents examined in camera below. (*Holmes*, *supra*, 90 Cal.App.4th at p. 315.)[6]

Pursuant to Gesner's request, we have reviewed the sealed records, and conclude the trial court did not abuse its discretion in not releasing them. The trial court correctly found there were no materials to disclose under the standards set out in *Brady*.

B. *Imposition of Consecutive Sentences on Sex Offense Convictions*

The trial court imposed consecutive sentences on counts 1, 2, and 3 pursuant to section 667.6, subdivision (d) (hereafter section 667.6(d)).[7] As described above, count 1 of the amended information charged Gesner with rape by force, violence, duress, menace,

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[6] We note that neither the prosecutor nor Gesner sought access to the DNA analyst's records pursuant to the so-called *Pitchess* procedures set out in Evidence Code sections 1043 and 1045. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.)

[7] The abstract of judgment does not indicate the statutory provisions under which the trial court sentenced Gesner for counts 1, 2, and 3. Although the probation report indicates that the trial court should impose consecutive sentences on these counts pursuant to section 667.6, subdivision (c) (which provides the trial court with discretion to impose concurrent or consecutive sentences), the District Attorney argued that the trial court should impose mandatory consecutive sentences under section 667.6(d). The trial court's comments at sentencing—and particularly the court's statement that "each of the sexual crimes was a separate act with sufficient time for the defendant to reflect"—indicate that the trial court imposed the consecutive sentences pursuant to section 667.6(d), and neither Gesner's counsel on appeal nor the Attorney General argues otherwise.

or fear of bodily injury; count 2 charged him with oral copulation by force, violence, duress, menace, or fear of bodily injury; and count 3 charged him with sexual penetration by force, violence, duress, menace, or fear of bodily injury. Section 667.6(d), mandates full consecutive sentences for certain enumerated offenses involving the same victim on separate occasions. The statute provides, "In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions." (§ 667.6(d).)

We apply a deferential standard of review to the trial court's determination that Gesner's convictions on counts 1, 2, and 3 constitute "separate occasions" under section 667.6(d). (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1092.) "Once a trial judge has found under section 667.6, subdivision (d), that a defendant committed offenses on separate occasions, we may reverse only if no reasonable trier of fact could have decided the defendant had a reasonable opportunity for reflection after completing an offense before resuming his assaultive behavior." (*Ibid.*)

Gesner argues that, given the "paucity of description" provided by Brenda, both in her trial testimony and in her more contemporaneous statements to police, "no reasonable trier of fact could have decided [he] had a reasonable opportunity for reflection between committing the described offenses." Gesner contends that "[t]his is particularly true with respect to the acts of digital penetration and oral copulation, which, from Brenda's descriptions, evidently occurred in immediate succession." We disagree.

The California Supreme Court has highlighted that, under section 667.6(d), "the appropriate analysis for determining whether sex offenses occurred on 'separate

occasions' was whether the defendant had a reasonable opportunity for reflection." (*People v. Jones* (2001) 25 Cal.4th 98, 105.) The statute does "not require[] a break of any specific duration or any change in physical location." (*Id.* at p. 104.)

Based on Brenda's testimony, a reasonable trier of fact could have concluded that the following acts occurred in sequence: (1) Gesner inserted his penis into her vagina; (2) on losing his erection, Gesner inserted his fingers in her vagina; (3) Gesner orally copulated her; (4) Gesner tried to reinsert his penis, but was not sufficiently erect; (5) Gesner masturbated to try to achieve an erection; (6) Gesner turned Brenda over onto her stomach; (7) Gesner reinserted his penis into her vagina; (8) Gesner took out a knife and put it near Brenda's throat; (9) Gesner turned Brenda over onto her back; (10) Gesner pushed her legs up to her shoulders; (11) Gesner inserted his fingers into her vagina; (12) Gesner took a drink of water from a bottle on the nightstand;[8] (13) Gesner orally copulated her again; and (14) Gesner unsuccessfully tried to penetrate her with his penis.

Brenda did not specifically articulate the period of time that elapsed between each of these discrete events, although she estimated the entire assault took place over approximately one hour. While each successive sexual act likely followed closely upon the other, at each point in time Gesner had to consciously decide to commit the separate acts. The points in time where he: (1) lost his erection and removed his penis; (2) inserted his fingers; (3) orally copulated Brenda; (4) masturbated; (5) repositioned Brenda; and (6) drank from the water bottle were all opportunities for him to reflect on

[8] Although there is some ambiguity in the record about when Gesner drank from the bottle of water in relation to the other events, the prosecutor asked Brenda, "At what point during the time he was in your room did you see him drink from that water bottle?" Brenda answered, "In the middle of it, he reached over, grabbed it . . . opened it, drank some of it, and . . . put it . . . on the floor."

his actions. Therefore, the trial court did not err in imposing consecutive sentences on counts 1, 2, and 3 pursuant to section 667.6(d).[9]

C. *Imposition of an Unstayed Sentence for Dissuading a Witness*

The amended information alleged that Gesner personally used a dangerous or deadly weapon—a knife—in the commission of the sexual offenses charged in counts 1, 2, and 3. (§ 667.61, subds. (b), (e).) Count 4 charged that Gesner dissuaded or attempted to dissuade a witness by use of force or threat of force in that he "did knowingly and maliciously prevent and dissuade and attempt to prevent and dissuade a witness and victim, Brenda Doe, from making a report of such victimization to a peace officer." The jury found true the allegations to counts 1, 2, and 3, and convicted Gesner of count 4. The trial court imposed separate punishment on counts 1, 2, 3, and 4. Gesner argues that the trial court erred in imposing a consecutive sentence on his conviction on count 4 for dissuading a witness because his "use of the knife during the commission of the sex offenses and while attempting to dissuade Brenda from reporting the crime served the same threatening objective." Gesner maintains that the trial court should have imposed but stayed the sentence for count 4 under section 654. We disagree.

Section 654, subdivision (a) provides, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct." (*People v. Deloza* (1998) 18 Cal.4th 585, 591.)

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[9] The Attorney General argues that, even if the trial court erred in its determination that the sex offenses occurred on separate occasions, that error was harmless because the trial court had discretion to impose consecutive sentences on counts 1, 2, and 3 pursuant to section 667.6, subdivision (c). Our conclusion that the trial court properly sentenced Gesner under subdivision (d) of section 667.6 makes it unnecessary to consider this contention.

" 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' " (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) "In such circumstances, the court must impose but stay execution of sentence on all of the convictions arising out of the course of conduct except for the offense with the longest sentence." (*People v. McCoy* (2012) 208 Cal.App.4th 1333, 1338.) "The failure of defendant to object on this basis in the trial court does not forfeit the issue on appeal." (*Ibid*.)

Here, the trial court did not make any express findings regarding the applicability of section 654. Where, as here, the trial court makes no explicit factual findings with respect to the application of section 654 and does not stay any aspect of the sentence, we must affirm the trial court's determination that section 654 does not apply if substantial evidence supports its implicit factual findings. (*People v. Mejia* (2017) 9 Cal.App.5th 1036, 1045.) We presume the existence of every fact the trial court could reasonably determine from the evidence. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) Whether a defendant harbored a single intent—and thus a single objective—is a factual question; the applicability of section 654 to settled facts is a question of law. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

"We first consider if the different crimes were completed by a 'single physical act.' [Citation.] If so, the defendant may not be punished more than once for that act. Only if we conclude that the case involves more than a single act—i.e., a course of conduct—do we then consider whether that course of conduct reflects a single 'intent and objective' or multiple intents and objectives." (*People v. Corpening* (2016) 2 Cal.5th 307, 311.) In this case, Gesner's forcible sexual assaults and his attempt to dissuade Brenda from calling the police were not completed solely by the single physical act of displaying a knife during the assault. Gesner also held Brenda down by pressing his

forearm against her throat after he assaulted her. Gesner thus forced Brenda to submit to him and dissuaded her from calling the police not just by brandishing his knife but also through the separate physical act of pressing his body against her. We next consider whether Gesner's course of conduct reflects multiple objectives.

Substantial evidence supports the trial court's implicit finding that Gesner had a separate objective in his use of the knife during the sexual offenses from his threats to her after he had ended the sexual assault. Gesner showed Brenda the knife and threatened to harm her, her mother, and her cat during the assault to prevent Brenda from resisting or from calling for immediate assistance from her mother, who was in the house. In taking these actions, Gesner sought to continue his sexual assault of Brenda. As the assault was ending, Gesner pressed his forearm against Brenda's throat, and told her he would return and kill her and her family if she called the police. With these actions, Gesner sought to prevent further investigation into his actions by the police. His reference to a police scanner in his parting threat further highlights Gesner's separate objective of preventing Brenda from calling for help once he had left.

Gesner cites *People v. Kelly* (2016) 245 Cal.App.4th 1119 in support of his argument that the trial court committed error under section 654, but that case does not assist him. In *Kelly*, the defendant accosted the victim on the street before pushing her to the ground, orally copulating her, and forcing her to orally copulate him. (*Kelly*, at p. 1125.) He then grabbed her, forced her into his vehicle, and drove to a liquor store. (*Ibid*.) The defendant left the victim in the car and, after he entered the building, she escaped to a nearby pharmacy. (*Ibid*.) The defendant was convicted of two counts of forcible oral copulation, with the jury finding true an aggravated kidnapping circumstance in connection with one of those counts, as well as one count of simple kidnapping. (*Id*. at p. 1126.) The court sentenced the defendant to an indeterminate term for forcible oral copulation with the special circumstance of aggravated kidnapping and a consecutive eight-year term for simple kidnapping. (*Id*. at p. 1124.) On appeal, the court

agreed with defendant that he "was punished twice for the same act of driving the victim to the liquor store" and thus his sentence for simple kidnapping should have been stayed under section 654. (*Kelly*, at p. 1137.)

Unlike the defendant in *Kelly*, who was punished twice for a single action (kidnapping), Gesner was here punished for two separate actions with separate objectives: (1) the forcible sexual assault, during which he showed the victim a knife and held it near her throat so that he could continue sexually assaulting her; and (2) the threat to return and kill the victim and her family if she called the police, presumably so that he would not be punished for his actions after he left the house. Brenda did not testify that Gesner was still displaying a knife when he told her not to call the police after he had completed sexually assaulting her; rather, she said he pressed his forearm against her throat before warning her not to call the police. In any event, it makes no difference that Gesner may have relied on a single instrument, i.e., the knife, to carry out the two objectives. Substantial evidence supports the trial court's implicit finding that Gesner's actions that evening were in pursuit of more than one objective. Therefore, the trial court did not err when it concluded that section 654 did not apply.

III. DISPOSITION

The judgment is affirmed.

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DANNER, J.

WE CONCUR:

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GREENWOOD, P.J.

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GROVER, J.

The People v. Gesner
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